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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 82237-9

COA # 28445-0

Spokane County Superior Court Case No. 08-3-00010-7
The Honorable Linda Thompkins
Superior Court Judge

In Re the Custody of SL
AARON LITTELL, PETITIONER

V

EDNA MICHELE LITTELL, RESPONDENT

APPELLANT'S OPENING BRIEF

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I. Introduction

This case involves a Superior Court decision to award custody of the12 year old daughter of a California father, to her paternal grandmother who lives in Spokane. The father contends that this decision was fraught with error by the trial court judges both substantively and procedurally, to such an extent that it should be overturned. The California father has asked that the Supreme Court to accept review and overturn this decision.

II. Assignment of Error

The natural father asserts that the Superior Court errored by:

1. The Superior Court errored by shortening the time for the determination of adequate cause (RCW 26.09.270) to just a few weeks of when the CR65 exparte orders were entered, since the decision to shorten time was done without motion or notice to the natural father.
2. The Superior Court errored by placing the initial burden of proof on the natural father in this RCW 26.10 action.
3. The Superior Court errored by finding that it was in the child's best interests to award custody of the child to the grandmother, even though the court did not find that the natural father was either unfit, or that the grandmother was a defacto parent.
4. The Superior Court errored by going forward with the case even though the Petition does not mention anything about the natural father being unfit or that it would be a determent for the child to live with him, and the child

was actually in the natural father's care when the Petition was filed (See RCW 26.10.030(1)).

5. The Superior Court errored by finding adequate cause in this matter even though there was no affidavit of service filed at the time the finding was made, setting out the time period for the Respondent natural father to answer.
6. The Superior Court errored by making this decision before a GAL, which was ordered, had been assigned and completed a report in this matter.

III. Statement of the Case

This case is an appeal from the Superior Court of Spokane County of a custody order under RCW 26.10, the non-parental custody statute. Mr. Littell, the Petitioner, is the natural father of the subject child, SL. [RP 14 line 23-25] The child's mother is Sara Ann Daniels, and she was not served although she was a party to the action. [RP 1 line 11-25] Mr. Littell did not waive Ms. Daniel's service. [RP 2 line 1-4]

In 2002 Mr. Littell was having difficulty with his daughter in California because she was acting out, lying, hurting herself, threatening other children, and stealing. [RP 19 line 2 to p.22 line 1] A California schoolteacher for the child filed a complaint with their state's CPS and an investigation began regarding these concerns. [RP 19 line 9 to p. 20 line 25]. Mr. Littell was so concerned about these problems that he made a list of SL's problems, which seemed endless. [Id.] Mr. Littell did not want SL to end up in the "CPS system" so he decided to talk to his mother in Spokane and see if she could help him with his daughter. [RP 22 line 2 to p.23 line 23] The Petitioner/Respondent herein agreed to help him with his daughter's problems by

allowing her to come live with her in Washington. [RP 142 line 20 & p. 147 line 2-7] The father testified that he told his mother that he was only temporarily sending SL up to her in Spokane. [RP 23 line 2 to p. 26 line 24] Mr. Littell even drafted a "temporary" agreement with his mother outlining this change in her care and the parties agreed and SL came up to her grandmother in December 2002 to live. [Id.] Additionally, he indicated that his mother also agreed with his plan to remove SL away from the California CPS, as well as why that was important. [RP 52 line 1-15]

With the knowledge of the move of SL to Spokane, California CPS dropped their investigation. [RP 54 line 7 to p.55 line 21] Between the time the father sent SL up to Spokane and the summer of 2006, he was only able to see his daughter a few times. [RP 56 line 22 to p.66 line 22] There are disputes about why this lack of contact occurred, which included testimony from the natural father that the grandmother refused or stood in the way of allowing the father's contact, along with the high cost of travel. [Id.] SL went to school and counseling in Washington and eventually stopped having problems, although it was not right away. [RP 89 line 4-21]

Approximately 1½ years after SL came up to Spokane the father and grandmother started becoming embroiled in arguments about how often he could see or have SL during the summer. [RP 57 line 13 to p.60 line 18]. In the summer of 2006 the father and grandmother had discussions about SL returning to him but according to him, she would not respond. [RP 41 line 9 to p.42 line 8]. In 2007 the father and the grandmother had some serious arguments again about his desire to spend more time with SL and now possibly terminating the temporary custody agreement and eventually with the grandmother agreeing SL would be returned. [RP 60 line 19 to p.

61 line 14] In 2007 the father tried to have SL again but was put off by his mother saying that SL was going on a Wyoming vacation instead; eventually, the father found out later that the trip to Wyoming never really occurred. [RP 63 line 14 to p.66 line 2] With the Wyoming fiasco in mind, Mr. Littell now felt he could not trust his mother with SL and especially in following their temporary custody agreement. [RP 66 line 3-20] He also began to be nervous about whether his mother would let SL return to his care as they agreed. [Id.] By the end of the summer 2007 these difficulties in communication became worse over a series of phone calls until he told the grandmother he wanted SL back in his care. [RP 69 line 16 to p.70 line 7]. By December 2007 nothing was resolved with regard to SL and the father flew up to Spokane, went to the grandmother's home and in writing terminated any agreement that they had to allow SL to remain with the grandmother. [RP 69 line 16 to p.70 line 7]. The record is not clear from trial, but the grandmother alleged that father then took SL back home with him to California at that time. [Appendix 1]. From that point on SL was with him in his care, until he was ordered to return SL to Spokane and the grandmother's care. [CP 3-8].

After the child was back in the father's care in California, in 2007 the grandmother filed a RCW 26.10 action and requested emergency orders, adequate cause, and temporary orders. [CP 1-8] Her Petition, which did not mention detriment as a basis, nor that the father was unfit, was filed January 3, 2008. [Id.] She did plead that SL had been basically living with her in Spokane due to problems in California and that the grandmother was fearful he would not provide proper schooling for her. [Id.] There was no affidavit of service in the file showing when Mr. Littell was served

with this Petition, therefore there was no way to tell when either the 60 days for default or the adequate cause motion was to run. [See Appendix 2, which is the online Superior Court Case Summary].

At the time of filing the Petition, the grandmother also presented a CR 65 motion to the Spokane County Exparte Commissioner; this motion requested that the Adequate Cause hearing be shortened to 20 days. [Appendix 1]. Without having any service on the father, the grandmother apparently convinced the Exparte Pro Tem Commissioner to shorten the 60 day out of state time limit for the adequate cause hearing to 20 days from the date of filing (not service), setting it on January 25th, 2008 in the exparte show cause order. [Id.] (See hand written portion of the order). The Pro Tem Commissioner also signed emergency orders requiring the natural father to fly up to Spokane to show cause why custody of SL should not go to the grandmother. [Id.]

The Adequate Cause hearing was held on February 1, 2008. [CP 12-13]. Temporary Orders were entered ordering that the child remain in Spokane with the grandmother and gave the father substantial parenting contact in the summer of 2008. [CP 14-15] More specifically the Adequate Cause order states that adequate cause was found, and that "the child has not been in the Respondent's care since 12-02, and/or there is adequate cause to determine if the child's growth and development would be detrimentally affected by placement with the Respondent" even though the Petition did not suggest that the child was in a detrimental situation in California. [CP 12-13 & 3-8]. The court also orally ordered that a GAL be appointed for the child,

however, that was never done. [See Appendix 3, a copy of the clerk's notes which state, "The Court orders the appointment of a GAL."]

After the temporary orders were entered the father complied and brought the child to the paternal grandmother in Spokane; he then took his summer parenting time in California where he testified that SL did very well in California with her stepmother and stepsiblings, and it was without incident. [RP 70 line 19 to p.71 line 7]. The grandmother did not rebut this evidence. [RP generally]. Just before trial the father brought SL up to Spokane so that she could see her grandmother before a decision was made regarding her permanent custody and the grandmother's counsel wanted her to visit with her counselor Dr. Brennan. [RP 103 line 1 to p.104 line 11]. Dr. Brennan did not testify at trial, in fact no expert testified at trial.

At trial, the grandmother did not show that there were any current problems with the child's environment in California, instead her testimony focused on how SL came up in 2002 and the father's contact since then. [RP 142 line 16 to p. 224 line 20]. The only thing that the Petitioner did was show an old 2002 "problem" list, drafted by the father, of the child's previous difficulties as a measure and proof of why she should be placed with her in Spokane. [Id. & RP 19 line 9 to p. 20 line 25]. This list did not reflect any current problems in 2007 or 2008. [Id.] The Petitioner's counsel also tried to have the court find that the grandmother was the child's defacto parent, but that was denied. [RP 274 line 5 to p.275 line 11] [CP 52-57]. However, the trial judge did find that it was in child's "best interests" to be placed with her grandmother, and that the Respondent did not satisfy his burden of proof to show that there were no longer any problems down in California. [CP 25-42] The court also did not find that the

father was unfit. [Id.]. The trial judge also indicated in her oral ruling that it took "notice of the testimony through the experts and the exhibits that [SL] was having a difficult time and anger and all sorts of problems were a part of her world", in spite of the fact that no experts testified at trial. [CP 37 line 11-17]. Neither did a GAL provide a report as was contemplated in the adequate cause hearing by the court commissioner. A final RCW 26.10 custody order was entered and this appeal was filed. [CP 47-66].

IV. Argument

A. There appear to be conflicting decisions in two different Appeals court divisions on some of the issues faced in this case.

Division III of our Court of Appeals and Division I have conflicting rulings on the how to use past RCW 26.09.270 case law on defining how to apply that Adequate Cause statute and interpretation and application of the new adequate cause statute at RCW 26.10.032. Division III has ruled in the case of *In re custody of BJB & BNB v. Barrett 2008-WA-0812.123*, that the lower courts should not use RCW 26.09.270 rulings by analogy, in their application of this new statute, since these are rulings between two natural parents and RCW 26.10 cases are completely different, being between a natural parent and non-parent. Division I however, has said exactly the opposite, and even used RCW 26.09.270 cases by analogy in their interpretation of the new RCW 26.10 adequate cause statute. *See Grieco v. Wilson; 2008-WA-A0602.001*

One example of how this is important is when we look at the grandmother's allegations in support of adequate cause in this case. She alleges a laundry list of historic

problems about the subject child, but never alleges "actual detriment". She also alleges that the child (like the Division I case) lived with the grandmother in Spokane a lengthy period of time as her primary basis for adequate cause in this case. In fact the Adequate Cause order itself says that it was because the child has not lived with the respondent natural father. In further example of this potential conflict of decisions, Division III stated, "The fact that the parties agreed the children were not in the custody of either parent gave rise to an undisputed basis to find adequate cause under the statute." *See Barrett supra.* However, Division I stated clearly that, "[b]ased on the plain language of RCW 26.10.032 and the case law interpreting the almost identical language in RCW 26.09.270, we conclude that in order to establish adequate cause to proceed with a non-parental custody action, in addition to showing either that the child is not in the physical custody of a parent or that neither parent is a suitable custodian, the petitioner must set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent." *See Grieco, supra.*

As can be seen, Division I states it is insufficient that the child is simply in the custody of the non-parent or that the natural parent is "not suitable", and Division III says that that is all that is needed to find adequate cause for a RCW 26.10 custody petition. *Id and Barrett, supra.* Additionally, Division III says that cases on adequate cause under RCW 26.09 are inapplicable, but Division I says that RCW 26.09.270 cases should be referenced to see how to apply this new statute. This is clearly a conflict in the law in this state between divisions of the courts of appeals, and makes is impossible to reconcile the facts and the finding of adequate cause in this case, as well as brief the concepts without referring to the Division's inclinations.

To further complicate this matter, Division III appears to take a "substance over form" approach to the Adequate Cause determination, by looking past the fact that the judge appeared to use the best interest standard. However, they also said, "Adequate cause in these cases thus requires something more than prima facie allegations" that are required in a RCW 26.09 action. *Id.* Whereas Division I actually used RCW 26.09.270 cases to justify their conclusions, but did not go beyond the pleadings. They actually denied adequate cause in *Grieco,* and found that because the Petitioner did not actually plead detriment his entire case should be dismissed, which is completely opposite of what Division III Justice Stephens has ruled.

Mr. Littell cannot either brief the issue of adequate cause or argue his position without offending either Division III or Division I on that issue. This is also a threshold and important issue given the facts in this case, as they are virtually identical to the Division I case. This case appears to fall under the guidelines of RAP 4.2(a)(3); this court should accept review.

B. The trial courts decision also conflicts with the ruling in *In re Custody of Shields, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006).*

The court in *Shields, 157 Wn.2d 126, 140, 150, 136 P.3d 117 (2006)* found that the trial courts application of the burden of proof standard, requiring the natural parent to show that her child would not be detrimentally affected by placement with her in Oregon, was a clear misapplication of the rules of evidence in a RCW 26.10 action. The RCW 26.10 Petitioner first must prove that there would be a detriment with the natural parent, and then the natural parent has the duty to show that this would not happen. In this case, the trial judge did not require the grandmother to show that there were still problems with

SL down in California, no expert testified that there was still a detriment, and no GAL report was filed to substantiate this allegation; instead at the time of the ruling the court found that the natural father had not "met his burden of proof" that the child would no longer suffer any problems with him in California. This basically forced the father into the same position that the *Shields* court said that the trial judge in that case had inappropriately required. [CP 36 line 18 to p.40 line 2].

There was no evidence provided by the grandmother from the child's therapist here in Spokane, showing that she was going to be detrimentally affected by placement with her father now, and she did not show anything that was currently a problem in the father's California home. In fact, the father testified that the child did fine the immediate summer before trial, and had no hint of the problems that she had when she was younger. The Petitioner basically testified that she simply thought she would do better up here because this was SL's home now, and she had integrated into a new life in Spokane. According to Shields it was the grandmother's burden to show that there were still problems in California, rather based on her oral ruling, it was the father's burden to show that there were no more problems down there like before. Mr. Littell testified that SL did fine in California this past summer, without any trace of problems. The grandmother was required to prove that that was not true; that SL actually did not do well down there. This is made even more significant when the record shows that the grandmother did not even have SL's local therapist testify about any problems she may have had down in California. Instead, the judge came to an erroneous conclusion when she said, "CPS was hovering" [CP 39 line 8], when in fact CPS had closed their file on this issue years ago.

The trial court clearly ignored the mandates of the Supreme Court in *Shield, supra* regarding where the initial burden of proof should lie in a RCW 26.10 case. The *Shields* court indicated that it is error to place the initial burden of proof on an otherwise fit natural parent in a RCW 26.10 case to first prove that it is alright for them to have custody of their child. *Id.* The Petitioner non-parent has the initial burden to show that the child would suffer detriment if they were placed with the natural parent first. *Id.* The court must consider what is going on in the child's life currently and in the future.[1] It is not the duty of the responding natural parent to prove that the child would do well in their care or that there is no detriment first; a fit natural parent is presumed under the law to have acted appropriately for their children. As this court said in *Sheilds, supra*:

> Second, and more troubling, instead of appropriately applying the presumption that Harwood, a fit parent, will act in the best interests of her child, the trial court applied an opposite presumption against Harwood. The trial court said, "[t]he reasons asserted for separating him [C.W.S.] from his siblings [to live with his mother] do not appear to be compelling in light of the totality of the circumstances." CP at 248. Thus, the trial court required Harwood to provide evidence of "compelling reasons" to gain custody of C.W.S., her son. *P. 148-149*

This is a case involving a fundamental and urgent issue of broad public importance. It appears that the trial courts misread the *Shields* mandates in RCW 26.10 cases, and construed the proof requirements to lean heaviest on those the Supreme Court never intended them to fall in such actions. Here, the grandmother never showed a current detriment for the child; nor did she show that the original decision to help her son with SL was a bad decision. Nevertheless the court indicated that the Respondent father never met his burden of proof that "things" were better in California so that SL could

[1] It is noteworthy that this sentence in and of itself was part of the difference in rulings between Division I and III. That is to say is it sufficient under the adequate cause statute to simply say the child has lived with the Petitioner a long time, or that there is a present detriment to the child, versus a past detriment.

return to his care, in spite of the fact that SL did well the entire summer before trial and the Petitioner did not show that the problems that occurred in 2002 continued in 2008. Basically, as in the *Shields* case, the trial became a forgone conclusion for Mr. Littell and SL. The ruling by the judge in this case shows that she did not follow the Supreme Court's mandates in setting the burden of proof in RCW 26.10 cases.

C. The reduction of time by exparte motion to hear the adequate cause issue from 60 days after service to 20 days after filing, is of significant public policy importance, since it basically changes the entire format of how to present and file cases involving a change of custody, as such it has broad public importance on the issue of proper notice and due process rights in a child custody case.

RCW 26.10.032 sets out the preliminary requirements for a non-parent to establish to be able have their Petition for custody of a child that is not theirs filed and heard. That statute states:

> (1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.
>
> (2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted. *Emphasis added.*

CR 4.1 and CR 12 outline the type of notice that is to be provided in a new domestic case in our state's Summons'. For a resident served in state it is 20 days, for a non-resident served outside Washington it is 60 days. Additionally, standard forms are required in many domestic cases, which are statutory and approved by the Supreme Court. The list of required forms include the filings necessary for a RCW 26.10 action.

See RCW 26.18.220. The approved forms for such actions can be found at http://www.courts.wa.gov/forms. The Summons for a RCW 26.10 action states in its text:

> ***To**: [Respondent]*
>
> 1. *An action has been started against you in the above court requesting that the petitioner be granted custody of the following children:*
>
>   *Additional requests, if any, are stated in the petition, a copy of which is served upon you with this summons.*
>
> 2. *You must respond to this summons and petition by filing a written response with the clerk of the court and by serving a copy of your response on the person signing this summons.*
>
> 3. *Your written response to the summons and petition must be on form WPF CU 01.0300, Response to Nonparental Custody Petition. Information about how to get this form may be obtained by contacting the clerk of the court, by contacting the Administrative Office of the Courts at (360) 705-5328, or from the Internet at the Washington State Courts homepage:*
>
>   ***http://www.courts.wa.gov/forms***
>
> 4. *If you do not file and serve your written response within 20 days (60 days if you are served outside of the state of Washington) after the date this summons was served on you, exclusive of the date of service, the court may, without further notice to you, enter a default judgment against you ordering the relief requested in the petition. If you serve a notice of appearance on the undersigned person, you are entitled to notice before an order of default may be entered.*
>
> 5. *You may demand that the other party file this action with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the other party must file this action with the court, or the service of this summons and petition will be void.*
>
> 6. *If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time. Copies of these papers have not been served upon your attorney.*
>
> 7. *One method of serving your written response and completed worksheets is to send them by certified mail with return receipt requested.*
>
>   *This summons is issued pursuant to Superior Court Civil Rule 4.1 of the state of Washington. [Clarification added at "To" Respondent, and emphasis added]*

As can be seen, Mr. Littell received a notice that he was to answer the issue of custody, i.e. adequate cause pursuant to RCW 26.10.032, within 60 days of service. [CP

1-2]. Yet at the same time an order was entered that this time was shortened to 20 days without his input and specifically without anything explaining why this should happen. [See Appendix 1].

The Petitioner never filed a request or motion to shorten the time for hearing the adequate cause issue in this case from the 60 days to 20 days after filing, therefore there was no apparent reason for this reduction request. A review of the case record (See appendix 2) clearly shows that no motion to shorten time for hearing the adequate cause issue was ever filed. *CR65* states that the attorney must certify the efforts he has made to contact the other party before trying to obtain exparte orders. The Petitioner's counsel did not do this nor was a separate *CR65(b)* declaration filed to that end. *Id.* Clearly there was no evidence the attorney for the Petitioner ever filed or served a motion to shorten time of the adequate cause issue as well, or let the Respondent have any input into why this should happen. *Id.*

Actually, there is no evidence of why the exparte court Commissioner simply hand wrote that the time for the adequate cause hearing was shortened; it appears to be an after thought without proper notice or argument. In either case, the time allowance required under *CR 4.1, CR 12,* and *RCW 26.10.032* should not have been reduced. The Supreme Court has made it clear that service of the statutorily required forms to obtain jurisdiction in a case is the first step in filing any case, and that the answer period rule is to be followed as a "bright light" rule; it is not 19 days, it is 20 days. In this case it was even longer and should have been 60 days. *See e.g. Troxell v. Rainier Public School Dist. No. 307, 154 Wn.2d 345; 111 P.3d 1173 (2005).*

RCW 26.10.032, CR 4.1, and CR 12(a)(3) allows and requires 60 days to pass before a default can be entered against a non-resident respondent. An Adequate Cause hearing is a "special statutory proceeding" and as such our Supreme Court has mandated that the Respondent or Defendant's response or the summons itself, and cannot be abrogated or changed in such statutory actions. See *Little v. Catania, 48 Wn.2d 890, 892-93, 297 P.2d 255 (1956) and Sowers v. Lewis, 49 Wn.2d 891, 894, 307 P.2d 1064 (1957).* By doing so, the Petitioner may change the statute inappropriately, which may violate the Respondent's due process rights. *Id.*

From a public policy standpoint, the rules regarding changes in the custody of children should be strictly followed; even the slightest deviation from the statutory requirements in such cases should not to be tolerated. (*See Shryock v. Shryock 76 Wn. App. 848, 888 P.2d 750 (1995); In re Marriage of Stern, 57 Wn. App. 707, 711, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990)* wherein the concepts surrounding the importance of following the procedures in custody modification under the adequate cause statutes is discussed and reemphasized.) The *Stern* court stated, in reference to following the adequate cause statutes: "Procedures relating to the modification of a decree of dissolution are statutorily prescribed. The courts' powers, therefore, are limited to those which may be inferred from a broad interpretation of the legislation that governs the proceeding. IN RE MARRIAGE OF SORIANO, 44 Wn. App. 420, 421, 722 P.2d 132 (1986), REVIEW DENIED, 107 Wn.2d 1022 (1987); ARNESON v. ARNESON, 38 Wn.2d 99, 227 P.2d 1016 (1951)." Changing how the statute is applied is not proper. *Id.*

It may be argued that any matter may be shortened for hearing as long as there is proper notice and time to respond. However, a deviation from the normal time limits is

permitted only so long as there is ample notice and proper time to prepare. *Loveless v. Yantis, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973).* The key is proper notice and time to prepare, here, although the parties went forward with the adequate cause hearing, there was absolutely no notice for the Respondent/Appellant to show him why the 60 days did not apply from his summons. There was also no notice for this apparent sua sponte hand written reduction of the required 60 days to respond for adequate cause, as such it cannot be justified in this case.

Finally, with no affidavit of service in the file there is no indication if they even served Mr. Littell within 20 days of the hearing on January 25th, 2008. The order only reduced the time from 60 days to 20 days, and set the matter on the 25th. The Petition was filed on the 3rd of January, leaving the Petitioner 2 days to serve Mr. Littell in California with the order, Petition, Motions, and declaration. Nevertheless, the adequate cause hearing went forward and nothing was said or done about the service time requirements. This alone is such a clear violation of the father's due process as to cause this court to vacate this ruling and dismiss the Petition.

D. Applying the standards outlined in RCW 26.09 to determine custody in a RCW 26.10 case is error and conflicts with this court's ruling in the *Shields* case.

The case of *Shields v. Harwood,* supra made it clear that the trial court has no authority to decide a *RCW 26.10* Non-parent Custody decision by application of the "best interest" standards outlined in *RCW 26.09 et seq*. The court said in the Shileds:

> Thus, while the trial court claimed to apply the heightened *Allen* standard, the trial court actually applied the "best interests of the child" standard, allowing a custody award to Shields, a nonparent, based only on a preponderance of the evidence and without the appropriate deference. *Troxel,* 530 U.S. at 66. Instead, under the actual detriment standard set

> forth in *Allen*, the trial court should have been focusing primarily on the effects on C.W.S.'s long-term growth and development, should he be placed with his mother, and the burden should be squarely placed on Shields. This test is not a balancing of all the aspects of each household and on C.W.S.'s wishes; it is a focused test looking at actual detriment to the child if placed with an otherwise fit parent. *Id. pg.149-150.*

It is error to use the lower "best interest" standard or RCW 26.09 standards unless the court finds that the Petitioner is a "de facto parent" (see *In re Parentage of LB 155 Wash.2d 679, 122 P.3d 161 (2005), cert denied, 547 U.S. 1143, 126 S.Ct. 2021, 164 L.Ed.2d 806 (2006).*) and that specifically did not happen here nor could it have under the *LB* factors. Therefore, it was inappropriate for the trial judge to use the "best interest" standard in this case in the final written orders.

E. Although a GAL was ordered, none was appointed. It was error for the trial court to go forward with trial without this experts report.

The facts are clear; the Court Commissioner specifically ruled orally that a GAL be appointed. However, when trial came around, no GAL report had been filed, and no GAL appointed. Additionally, the affidavits/declarations filed by the Petitioner seem to indicate that the Petitioner's theory revolved around some sort of CPS or potential abuse problem in California. As such this case must be guided by not only its own orders, but the laws of this state. RCW 26.44.053 requires that a GAL be appointed if there are any allegations of abuse or neglect. It states, "[I]n any judicial proceeding under this chapter or chapter 13.34 RCW in which it is alleged that a child has been subjected to child abuse or neglect, the court shall appoint a guardian ad litem for the child as provided in chapter 13.34 RCW. The requirement of a guardian ad litem may be deemed satisfied if the child is represented by counsel in the proceedings."

Even though the court commissioner required a GAL, the trial judge let the matter go to trial without a GAL report. A GAL could have witnessed the child in California and told the court if there was any abuse and clarified this issue. Since this was not done, it was error to proceed with the trial.

V. Conclusion

A natural parent has the freedom to raise their child the way they see fit. Interference by the state in that process should be limited, and in fact is limited to special circumstances where the parents are unfit, or where it would be detrimental for the child to live with the natural parent. In order to prove their case of either unfitness or detriment the non-parent is required in this state to show by clear evidence these factors exist. The initial burden to prove this point is on the non-parent. In this case, although SL had problems in California, the origin of those problems was not clear. The father needed help and turned to his mother in Spokane, who agreed with him that SL needed to get away from falling into, as they called it the "CPS system". This was not a one-way street where the grandmother did not participate in removing SL from the difficulties in California. She also received SL knowing that it was not permanent.

After a few years in her grandmother's care, SL was doing better. No one testified why this occurred, but it happened. CPS dropped their investigation of SL's problems and the father was never ever found to harm children; in fact SL has other step siblings in California that she did well with just before trial in 2008. In spite of these facts the judge required the father to prove SL would be OK in California before the grandmother was required to show that there was any current problem down there. By shifting this burden

of proof the court basically did what the Shields court instructed future RCW 26.10 courts not to do; make the natural parent show that they were proper custodian of the child first. Even though grandma knew that this was not a permanent arrangement, and even though SL was actually in the father's care when she filed her petition, she proceeded in this matter to obtain restraints to require the father to return his child to Spokane.

To top off the trial findings, the trial never had jurisdiction over Mr. Littell when the orders were entered without an Affidavit of Out of State Service being filed, as is required by statute and law. This case also suffered from significant procedural and due process problems in that the time for adequate cause hearing was shortened significantly in complete contrast to what the Summons told the father. Add to that that no affidavit of service appears to have been originally filed at the time of the temporary orders and there were significant procedural problems in this case that make it ripe for dismissal.

Finally, no expert testified at trial to anything, yet the Judge found some detriment due to what she referred to as "testimony through the experts" and exhibits. Since there were no experts who testified at trial this statement is clearly illogical and erroneous. Additionally, although a GAL was ordered none was appointed and so no GAL report was there to corroborate the grandmother's story. And although this was the grandmother's petition the judge seemed to suggest that the fact that a GAL was ordered and not appointed was somehow his doing or fault, when clearly the grandmother's counsel wrote the order, yet did nothing to make it happen.

This is a case that needs this higher court's attention; it is full of error after error in the burden of proof, standard to use in such cases, basis for the decision, numerous procedural defects, let alone the failure to follow through with a GAL report The Appellant respectfully requests that this decision be overturned.

Respectfully submitted this 6th day of April 2009.

/S/_____
Gary R. Stenzel, WSBA #16974

Appendix 1

Superior Court Case Summary

Court: Spokane Superior
Case Number: 08-3-00010-7

Sub	Docket Date	Docket Code	Docket Description	Misc Info
-	01-03-2008	$FFR	Filing Fee Received	
1	01-03-2008	SMPT ATP0001	Summons & Petition For Custody Gauper, Allen Morris	
2	01-03-2008	CNRSE	Confidntl Report In Sealed Envelope Conf Info Form	
3	01-03-2008	MEXRSC ATP0001	Mtn/dcl For Exparte Ro And Ordsc Gauper, Allen Morris	
4	01-03-2008	ORTSC COM0040	Order To Show Cause 1-25/8:30/301 Pro Tem Comm. Marla Carey Hoskin	
5	01-03-2008	NTHG	Notice Of Hearing For Adeq Cause	01-25-2008F1
6	01-03-2008	ORDINFO COM0040	Order Re: Release Of Information Pro Tem Comm. Marla Carey Hoskin	
7	01-22-2008	NTAS	Notice Of Assignment Com Grovdahl Jdg Cozza	
		JDG0011	Judge Maryann C. Moreno	
8	01-24-2008	NTAPR ATR0001	Notice Of Appearance Mckay, Julie M.	
9	01-24-2008	ORCNT COM0022	Order Of Continuance Commissioner Michelle Ressa	02-01-2008F1
-	01-25-2008	HCNTPA COM0035	Continued: Plaintiff/pros Requested Commissioner Steven N. Grovdahl	
10	01-29-2008	CNRSE	Confidntl Report In Sealed Envelope	
-	01-29-2008	CSAUTH	Cover Sheet For Authorization	
11	01-29-2008	CNRSE	Confidntl Report In Sealed Envelope	
-	01-29-2008	CSAUTH	Cover Sheet For Authorization	
12	01-29-2008	CNRSE	Confidntl Report In Sealed Envelope Declaration	

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calender their caseloads on local systems, this search tool cannot diplay superior court calendering information.

Contact Information

Spokane Superior
1116 W Broadway Ave
Spokane, WA 99260-0350
Map & Directions
509-477-5790[Phone]
509-477-5714[Fax]
Visit Website

Disclaimer

This information is provided for use as reference material and is not the official court record. The official court record is maintained by the **court of record**. Copies of case file documents are not available at this website and will need to be ordered from the **court of record**.

The Administrative Office of the Courts, the Washington State Courts, and the Washington State County Clerks :

1) Do not warrant that the information is accurate or complete;

2) Do not guarantee that information is in its most current form;

3) Make no representations regarding the identity of any person whose name appears on these pages; and

4) Do not assume any liability resulting from the release or use of

13	01-29-2008	CSCRIM	Cover Sheet For Criminal History	
14	01-29-2008	CRRSP	Correspondence	
15	01-29-2008	DCLR	Declaration Aaron Littel	
16	01-29-2008	DCLR	Declaration Tawnia Penick	
17	01-29-2008	DCLR	Declaration Roger Craver	
18	01-29-2008	DCLR	Declaration Nicole Littell	
-	02-01-2008	MTHRG COM0036	Motion Hearing Commissioner Valerie Jolicoeur	
19	02-01-2008	RPY	Reply Declaration	
20	02-01-2008	ORRACG COM0036	Order Re Adequate Cause - Granted Commissioner Valerie Jolicoeur	
21	02-01-2008	OR COM0036	Order Re Temp Custody Commissioner Valerie Jolicoeur	
22	02-01-2008	TRMIN	Trial Minutes	
23	02-07-2008	CNRSE	Confidntl Report In Sealed Envelope	
-	02-07-2008	CSBKGD	Cover Sheet For Background Check	
24	02-07-2008	CNRSE	Confidntl Report In Sealed Envelope	
-	02-07-2008	CSBKGD	Cover Sheet For Background Check	
25	02-07-2008	OR COM0002	Order On Nonparental Custody Commissioner Joseph F. Valente	
-	05-08-2008	STAHRG	Status Conference / Hearing	
26	05-08-2008	ORSCS JDG0016	Order Setting Case Schedule Judge Salvatore F. Cozza	08-11-2008TS
27	07-01-2008	NTWSUB WTR0001	Notice Withdraw & Substitut Counsel Mckay, Julie M.	
		ATR0002	Stenzel, Gary R.	
-	08-08-2008	MTHRG COM0036	Motion Hearing Commissioner Valerie Jolicoeur	
28	08-08-2008	TRMM	Trial Memorandum	
29	08-08-2008	MTAF	Motion And Affidavit/declaration	
30	08-08-2008	OR COM0036	Order Re Time W/child Commissioner Valerie Jolicoeur	
31	08-08-2008	TRMIN	Trial Minutes	
-	08-11-2008	NJTRIAL JDG0034	Non-Jury Trial Judge Linda G Tompkins Id#68	
32	08-11-2008	AFSR	Affidavit/dclr/cert Of Service	
-	08-18-2008	MTHRG JDG0034	Motion Hearing Judge Linda G Tompkins Id#68	

the information.

Please consult official case records from the **court of record** to verify all provided information.

33	08-19-2008	CNRSE	Confidntl Report In Sealed Envelope Financial Source
34	08-19-2008	WTRC	Witness Record
35	08-19-2008	STPORE JDG0034	Stipv Ret Exhbts Unopned Depostns Judge Linda G Tompkins Id#68
36	08-19-2008	TRMIN	Trial Minutes
37	08-25-2008	VRPRC	Verbatim Report Courts Ruling 08-18-08 Jdg Tompkins
-	09-10-2008	MTHRG JDG0034	Motion Hearing Judge Linda G Tompkins Id#68
38	09-11-2008	RS JDG0034	Residential Schedule (final Order) Judge Linda G Tompkins Id#68
39	09-11-2008	CSW	Child Support Worksheet
40	09-11-2008	FNFCL	Findings Of Fact&conclusions Of Law
41	09-11-2008	ORS	Order For Support
42	09-11-2008	DCC JDG0034	Decree Of Custody Judge Linda G Tompkins Id#68
43	10-10-2008	NT	Notice Discretionary Review
44	10-17-2008	PNCA	Perfection Notice From Ct Of Appls
45	10-17-2008	TRLC	Transmittal Letter - Copy Filed
46	12-04-2008	DSGCKP	Designation Of Clerk's Papers
47	12-15-2008	INX	Index To Clerks Papers
48	01-07-2009	NT	Notice Of Filing Verbatim Report
-	01-07-2009	VRPRC	Verbatim Report Of Proceedings Hrg: 8/11&12/08 Rptr: R. Corbey
-	01-21-2009	VRPT	Verbatim Rpt Transmitted-Supremect
49	01-26-2009	TRLC	Transmittal Letter - Copy Filed

Appendix 2

FILED

JAN 03 2008

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

In re the Custody of:
SAMARA CHEYENNE DANIELS-LITTELL,
Child,

EDNA MICHELE LITTELL,
Petitioner,

and

AARON ANTHONY LITTELL and SARA ANN DANIELS,
Respondent.

NO. 08 300010-7

EX PARTE RESTRAINING ORDER/ ORDER TO SHOW CAUSE FOR Adequate Cause.
(NONPARENTAL CUSTODY)
(TPROTSC/ORTSC)

[ ] Clerk's Action Required
[ ] Law Enforcement Notification, ¶ 4.1

RESTRAINING ORDER SUMMARY:

Restraining Order Summary is set forth below:

Name of person(s) restrained: Aaron Anthony Littell . Name of person(s) protected: Samara Cheyenne Daniels-Littell. **See paragraph 4.1.**

VIOLATION OF A RESTRAINING ORDER IN PARAGRAPH 4.1 BELOW WITH ACTUAL KNOWLEDGE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST. RCW 26.10.115.

I. SHOW CAUSE ORDER

It is ordered that Aaron Anthony Littell appear and show cause, if any, why adequate cause should not be granted and Samara Cheyenne Daniels Little be placed in the care, custody, and control of Edna M. Littell, and the other relief, if any, requested in the motion should not be granted. A hearing has been set for the following date, time and place:

Date: January ~~22~~ 25, 2008
Time: 8:30 a.m.
Place: Spokane County Superior Court
1116 W. Broadway Avenue
Spokane, WA 99260

SALINA, SANGER & GAUPER
ATTORNEYS AT LAW
824 U.S. BANK BUILDING
WEST 422 RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201
(509) 838-2700

Room/Department: Family Law Department

If you disagree with any part of the motion, you must respond to the motion in writing before the hearing and by the deadline for your county. At the hearing, the court will consider WRITTEN sworn affidavits or declarations. Oral testimony may NOT be allowed. To respond, you must: (1) file your documents with the court; (2) provide a copy of those documents to the judge or commissioner's staff; (3) serve the other party's attorney with copies of your documents (or have the other party served if that party does not have an attorney); and (4) complete your filing and service of documents within the time period required by the local court rules in effect in your county. If you need more information, you are advised to consult an attorney or a courthouse facilitator.

FAILURE TO APPEAR MAY RESULT IN A TEMPORARY ORDER BEING ENTERED BY THE COURT WHICH GRANTS THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE.

II. BASIS

A motion for a temporary restraining order has been made to this court. The court has consulted the judicial information system, if available, to determine the existence of any information and proceedings that are relevant to the placement of the child.

III. FINDINGS

INDIAN CHILD WELFARE ACT

The child is not an Indian child as defined by 25 U.S.C § 1903 and the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., does not apply to these proceedings.

Jurisdiction:

The court adopts paragraphs 2.1, 2.2, and 2.4 of the Motion/Declaration for an Ex Parte Restraining Order and for an Order to Show Cause (Form WPF CU 03.0150) as its findings, except as follows:
It is appropriate to shorten time from 60 to 20 days for Adequate Cause hearing. Aaron A. Littell shall appear for Adequate Cause hearing time set above.

must

IV. ORDER

It is ORDERED: Adequate Cause hearing shall be held 1/25/08.

4.1 RESTRAINING ORDER. Respondents are ordered to appear at time of hearing to determine adequate cause.

Does not apply.

4.2 OTHER RESTRAINING ORDER.

Does not apply.

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4.3 SURRENDER OF DEADLY WEAPONS.

Does not apply.

4.4 EXPIRATION DATE.

Does not apply.

4.5 OTHER.

Does not apply.

Dated: 1/3/08 at 10:45 a.m./p.m.

~~JUDGE~~/COMMISSIONER Pro Tem

Presented by:

ALLEN M. GAUPER Date 1-2-08
WSBA #6884
Attorney for Petitioner

SALINA, SANGER & GAUPER
ATTORNEYS AT LAW
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JAN 0 3 2008

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

In re the Custody of:
SAMARA CHEYENNE DANIELS-LITTELL,
Child,

EDNA MICHELE LITTELL,
Petitioner,

and

AARON ANTHONY LITTELL and SARA ANN DANIELS,
Respondents.

NO. 08300010-7

MOTION/DECLARATION FOR EX PARTE RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE (NONPARENTAL CUSTODY) **(MTSC)**

3

I. MOTION

Based upon the reasons set forth in the declaration below, the undersigned moves the court for a temporary order and order to show cause.

1.1 EX PARTE RESTRAINING ORDER.

Does not apply.

1.2 OTHER EX PARTE RELIEF.

Order that the respondents be required to appear and respond and defend on January 22, 2008, re: Notice of Hearing for Adequate Cause Determination.

1.3 SURRENDER OF DEADLY WEAPONS.

Does not apply.

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1.4 OTHER TEMPORARY RELIEF.

Aaron Anthony Littell should also be required to appear and show cause why the court should not enter a temporary order which:

- grants the petitioner custody of the following child:
- Samara Cheyenne Daniels-Littell
- gives reasonable visitation to Aaron Anthony Littell
- orders child support as determined pursuant to the Washington State Support Schedule.

1.5 INDIAN CHILD WELFARE ACT.

Does not apply.

Dated: 1-2-08

ALLEN M. GAUPER, WSBA #6884
Attorney for Petitioner

II. DECLARATION

2.1 INJURY TO BE PREVENTED.

The ex parte restraining order requested in paragraph 1.1 above is to prevent the following injury (define the injury):

Physical/emotional harm.

2.2 REASONS WHY THE INJURY MAY BE IRREPARABLE.

This injury may be irreparable because:

A. I am the paternal grandmother of Samara Daniels-Littell, born April 14, 1996.
B. In January of 2001, my son, the respondent herein, obtained custody of Samara in Spokane, Washington, I believe under Spokane County Cause Number 96-5-01204-7.
C. My son, shortly thereafter, married Nicole Littell, I believe in Spokane, and they moved to California with Samara.
D. Child Protective Services, or a similar entity, was contacted, I believe because school officials noticed some problems with Samara. There was some sort of emergency psychiatric treatment, and ultimately Samara was returned to Spokane and left with me on or about December 28, 2002.
E. My son prepared a document providing that I would have the care and custody of Samara.
F. Samara went to visit her father in California for about six weeks in the summer of 2003, essentially from early July until late August.

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G. My son had no direct contact with Samara in 2004, 2005, or 2006, with the exception that he came here Christmas of 2006 and spent maybe three or four days here visiting with Samara.

H. Since December of 2002, my son has maintained somewhat regular phone contact with Samara.

I. I have had Samara in regular counseling with Dr. Ellen Brenner. Issues seem to center around the trauma that occurred between Samara's birth in 1996 and the time she was placed with me in December of 2002. There was harsh/inappropriate discipline, her step mom has some psychological/psychiatric issues surrounding self-mutilation, and life in that household seemed to be quite bizarre.

J. My understanding is that, because I was receiving a grant, the state of Washington was pursuing my son for increased child support, as he has been paying $25 per month. As a result of that support enforcement action, he came to Spokane without advance notice on December 8, 2007, and took Samara back to California.

K. Samara's mother has had one contact with her since December of 2002. She came by for a brief visit. I have not seen, nor heard, of her since early 2003.

L. I am concerned about Samara's wellbeing. She has done well at Regal Elementary, where she would be in sixth grade, if she were here. I am concerned that the respondent will not place Samara in school; rather, will attempt to have her home schooled, such that there is no public scrutiny of her well being.

M. The only reason respondent removed Samara from my care is to avoid paying an increased amount of child support.

N. At the time that Samara was placed with me, I was an electrician. Because Samara was placed with me, I changed careers and became a seamstress at Artistic Draperies, working there part time. For the past five years, I, not either of the respondents, provided for all of her care (with the exception of the brief stay in California), and she has been flourishing in my household.

2.3 REASONS FOR OTHER EX PARTE RELIEF.

See paragraph 2.2.

2.4 CLEAR AND CONVINCING REASONS WHY WEAPONS SHOULD BE SURRENDERED.

Does not apply.

2.5 REASONS FOR A TEMPORARY ORDER.

See paragraph 2.2.

2.6 SERVICE MEMBER OR DEPENDENT OF SERVICE MEMBER.

Does not apply.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Spokane, Washington, on December 28, 2007.

Edna Michele Littell
EDNA MICHELE LITTELL

DO NOT ATTACH FINANCIAL RECORDS TO THIS DECLARATION. FINANCIAL RECORDS SHOULD BE SERVED ON THE OTHER PARTY AND FILED WITH THE COURT SEPARATELY USING THE SEALED FINANCIAL SOURCE DOCUMENTS COVER SHEET (WPF DRPSCU 09.0220). IF FILED SEPARATELY USING THE COVER SHEET, THE RECORDS WILL BE SEALED TO PROTECT YOUR PRIVACY (ALTHOUGH THEY WILL BE AVAILABLE TO THE OTHER PARTIES IN THE CASE, THEIR ATTORNEYS, AND CERTAIN OTHER INTERESTED PERSONS. SEE GR 22 (C)(2)).

III. EFFORTS TO GIVE OTHER PARTY NOTICE

The following efforts have been made to give the other party or other party's lawyer notice and the following reasons exist why notice should not be required: NONE

Dated: 1-2-08

Allen M. Gauper
ALLEN M. GAUPER, WSBA #6884
Attorney for Petitioner

SALINA, SANGER & GAUPER
ATTORNEYS AT LAW
924 U.S. BANK BUILDING
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Appendix 3

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FEB 0 1 2008

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON, COUNTY OF SPOKANE

Littell, Edna Plaintiff(s), vs. Littell, Aaron, Defendant(s).	CASE NO. 2008-03-00010-7 **COURTROOM MINUTES** *(TRMIN)* **Type: Family Law**

22

Dept. 102 *Judge: Court Commissioner Valerie Jolicoeur*

CD-Digital Recording: Start: 11:20:21 End: 11:43:58
CD-Digital Recording: Start: 11:47:06 End: 11:54:23

On this 1st day of February, 2008, this cause came on regularly for Hearing by the Court.

Petitioner is present and is represented by counsel: Al Gauper.
Respondent is present and is represented by counsel: Julie McKay.

presents case. rests case.

presents case. rests case.

Final Arguments made.

Court Finding: The Court makes a finding of adequate cause. The child is to be returned to Spokane immediately and back to the petitioner's care. The child to start counseling immediately. No one is to talk to this child about this case. The Court orders the appointment of a GAL. Phone contact with the respondent/father and the child is allowed and visitation contact for Spring Break and Summer.

Sara Dickerson, Deputy Clerk *Date: 02/01/08*